Supreme Court, U.S.
FILED
97 • 572 SEP 30 1997
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THOMAS CYR AND KEVIN CAPPER,
Petitioners,

V.

THE CITY OF DALLAS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51pp

QUESTIONS PRESENTED

1. Are "pain compliance" policies of municipalities and the use of unreasonable and excessive force permissible to compel citizens to comply with verbal orders of law enforcement officers?

2. Are Fourth Amendment standards violated by law enforcement officers who employ "pain compliance" techniques and chemical mace spray against a handcuffed and passively restrained prisoner?

3. Are law enforcement officers entitled to "qualified immunity" after and an Internal Affairs Division investigation concludes that the officers engaged in unreasonable and unnecessary force against a passively restrained prisoner?

4. Is "qualified immunity" a question of law when used as a defense in an excessive force Fourth Amendment case?

5. Is a city immune from liability after admitting it inadequately trained and supervised its law enforcement officers in the use of chemical mace against passive and peaceful arrested?

PARTIES LISTED

Pursuant to Rules 14.1(b) and 29.1, Petitioners certify that the following is a complete list of all parties to this proceeding, including parent companies and subsidiaries (except wholly owned subsidiaries):

1. Tom Cyr - Petitioner/Appellant
2. Kevin Capper - Petitioner/Appellant
3. The City of Dallas, Texas - Respondent/Appellee.
4. The Dallas Police Department - Respondent/Appellee.
5. Robert Jackson, Interim Dallas Police Chief - Respondent/Appellee.
6. Granver Tolliver - Respondent/Appellee.
7. Sergeant, Richard Garcia - Respondent/Appellee.
8. Senior Corporal, Herbert W. Parker - Respondent/Appellee.
9. Joseph R. Mains - Respondent/Appellee.
10. Captain, David Kowalski - Respondent/Appellee.

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Thomas Cyr and Kevin Capper, by and through counsel, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

A copy of the Opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix B. A copy of the Order of the United States Court of Appeals for the Fifth Circuit denying Petitioners' Petition for Rehearing before that Court is attached hereto as Appendix A. The United States Court of Appeals for the Fifth Circuit affirmed the Summary Judgment of the United States District Court for the Northern District of Texas, Dallas Division. A copy of the Memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Dallas Division is attached hereto as Appendix C. A copy of the Final Judgment of the United States District Court for the Northern District of Texas, Dallas Division is attached hereto as Appendix D.

JURISDICTION

On April 3, 1997, the United States Court of Appeals for the Fifth Circuit entered its decision affirming the Final Judgment of the United States District Court for the Northern District of Texas, Dallas Division. The Petitioner's Motion for Rehearing of the Panel Opinion and Suggestion for Rehearing En Banc was filed on April 16, 1997 and denied by the Fifth Circuit on July 3, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no

> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983:

> Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioners claim that Respondents adopted an unconstitutional "pain compliance" policy and that the law enforcement officers of the City of Dallas engaged in the use of excessive and unreasonable force in order to coerce the Petitioners to follow a verbal command of a police officer. Petitioners seek monetary and declaratory relief from the Respondents.

On February 27, 1993, Petitioners were arrested for misdemeanor criminal trespass while engaging in a protest at an abortion clinic. Both were handcuffed and lying passively on the floor. Each was asked to stand and leave. Each refused. Because of this refusal, Petitioners were subjected to pain compliance holds and were sprayed in the face with pepper mace. At the time that Petitioners were subjected to pain compliance holds and sprayed with pepper mace, they were: handcuffed; lying passively on the floor; not resisting arrest or attempting to flee; not posing any threat to any person; and not interfering with the activities of the clinic or the law enforcement officials on the scene.

Following their arrest, Petitioners filed a complaint with the Internal Affairs Division of the Dallas Police Department. Following an extensive investigation, the Internal Affairs Division concluded that the officers on the scene had used "unnecessary force against a handcuffed abortion protestor." This finding was reviewed by the Dallas City Attorney's office which concluded that the allegations of unreasonable force "are supported by the evidence."

Prior to the February 27, 1993, incident, there was no training by the Dallas Police Department on the use of pepper mace on passive, handcuffed prisoners.

On February 25, 1994, Petitioners filed suit in state district court in Dallas County. (TR. Vol. 3, pp. 579-580) On April 7, 1995, Petitioners filed their First Amended Original Petition in state court asserting a cause of action under 42 U.S.C. § 1983. Respondents removed the suit to United States District Court for the Northern District of Texas on April 24, 1995. (TR. Vol. 3, p. 580)

The Respondents filed a motion for summary judgment based, primarily, upon the Respondents' contention that the law enforcement officers were entitled to "qualified immunity" against the Fourth Amendment claim. Respondents claimed that the use of pepper mace to the face of a passive, handcuffed prisoner did not violate the prisoner's civil rights and was not unreasonable as a matter of law. The district court granted the motion for summary judgment filed by the Respondents. The district court issued its Memorandum Opinion and Order dated July 2, 1996 and entered on the docket of the court on July 8, 1996. Petitioners perfected their appeal to Fifth Circuit by filing a notice of appeal on August 1, 1996.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit's analysis of the "qualified immunity" defense in the context of a Fourth Amendment excessive force claim is inconsistent with the analysis in this Court's Fourth

Amendment cases and conflicts with the decisions and analyses of the other federal circuits.

The Fifth Circuit concluded that the question of whether or not a law enforcement officer acted with "objective reasonableness" is a question of law to be determined by the trial court on a Motion for Summary Judgment raising "qualified immunity" as an affirmative defense. The Fifth Circuit's analysis is flawed and is clearly contrary to the analyses and decisions of the other federal circuits. The need for clarity and uniformity of decisions among the federal circuits is paramount, and this Court should grant the Writ of Certiorari to set forth the established standards for applying the "qualified immunity" defense to a Fourth Amendment excessive force claims.

This Court should also grant the Writ of Certiorari in order to defend and protect the right of citizens to have their factual cases determined by a jury of their peers as opposed to courts through the summary judgment process. The Fifth Circuit's analysis of the responsibility and duties of the courts when determining summary judgments is flawed and erroneous when applied in the light of the totality of the circumstances required in a Fourth Amendment excessive force claim. Clarification of the standards of analysis and tests to be used when determining summary judgments asserted on the basis of "qualified immunity" to defeat a Fourth Amendment excessive claim are necessary. Clarity of the standard within the circuits cries out for this Court's review in this instance.

I. The Fifth Circuit's Decision Conflicts with the Decisions of Other Circuits who have Addressed Whether or Not the "Qualified Immunity" Defense is Appropriate in an Analysis of the "Totality of the Circumstances" in a Fourth Amendment Excessive Force Claim

The Fifth Circuit's opinion in this case holds that the question of the application of the "qualified immunity" is solely a question of law, and not fact and, therefore, the Court, without the aid of a jury, is capable of making the legal determination of

whether "qualified immunity" is applicable to a Fourth Amendment excessive force claim. Other circuit courts, however, employ a different standard and question whether or not "qualified immunity" should be a defense at all. See, *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993); *McKinney By McKinney v. DeKalb County*, 997 F.2d 1440 (11th Cir. 1993); *Harper v. Harris County*, 21 F.3d 597 (5th Cir. 1994) (Garza, J. dissenting;) *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir. 1993) (court suggest no immunity defense); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991) (qualified immunity issue no different from substantive Fourth Amendment inquiry); *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993) (suggesting that the issue is for the jury).

Other circuits have held that no qualified immunity can be claimed with respect to unconstitutional conduct that involves an element of culpability that is inconsistent with the finding that the defendants acted in a reasonable objective manner. *See, Beard v. City of Northglenn*, 24 F.3d 110 (10th Cir. 1994) (if the claimant proves that the police deliberately submitted false information to obtain a search warrant no immunity defense is applicable); *Hill v. Shelander*, 992 F.2d 714 (7th Cir. 1993) (if police officer engages in malicious intent to cause harm to citizen, no immunity defense is available); *Slone v. Herman*, 983 F.2d 107 (8th Cir. 1993); *Hamilton v. Endel*, 981 F.2d 1062 (9th Cir. 1992) (deliberate indifference to the medical needs of a citizen precludes immunity); *Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1993) (false statements by public officials in petition to remove children from shelter not protected by qualified immunity defense); *Wood v. Osprander*, 879 F.2d 583, 591 n.7. (9th Cir. 1989) (a claim based on deliberate indifference standard is not subject to immunity defense); and, *Woods v. Sunn*, 852 F.2d 1205 (9th Cir. 1988) (denial of medical care to prisoner does not entitle defendants to immunity defense).

In response to this Court's decisions in *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam), some, but not all of the federal circuits, have employed a new concept of "arguable

probable cause" in Fourth Amendment qualified immunity analysis cases. Confusion exists among the circuits as to how the concept of qualified immunity should be applied in a Fourth Amendment case that requires a review of the totality of the circumstances. Where probable cause is established, the Court should grant summary judgment on the merits and not on the qualified immunity grounds, but courts continue to rule on the immunity issue, instead of the merits.

II. The *Graham* Standard.

The Fifth Circuit's analysis of this Court's decision in *Graham v. Conner*, 490 U.S. 386 (1989) is in conflict with the interpretations given by the other federal circuits. The federal circuits are confused about how this Court would apply the *Graham* excessive force standards in the context of a summary judgment on the basis of "qualified immunity." This Court ruled in *Graham* that excessive force claims arising out of arrests of "free citizens" are properly analyzed under the Fourth Amendments objective reasonableness standards. In this case, the Fifth Circuit applied the objection reasonableness standards as a matter of law and determined that, as a matter of law, the police officers' spraying of pepper mace to the face of Petitioners, Cyr and Capper, was objectively reasonable and, thus, that the police officers were entitled to "qualified immunity." This Court, however, held that a determination of the reasonableness of the conduct "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to abate arrest by flight." *Graham, supra* at 396.

This Court, in *Graham*, did not address the question of whether "qualified immunity" is applicable in excessive force cases. *Graham, supra*, at 399 n.12. The federal circuits have been applying different standards of analysis of "qualified immunity" in the context of excessive force cases. This Court should grant certiorari in this case in order to clarify whether qualified immunity is applicable to a Fourth Amendment

excessive force case in order to give uniformity of direction and decision making to the federal circuits.

A strong argument can be made that the use of more force than is necessary by a law enforcement officer preempts the qualified immunity defense. The question is whether the force used by the law enforcement officer was justified and necessary; was it reasonable under the totality of the circumstances? This is not an area of law that involves a magnitude of legal opinions. Each case will present different facts, but a well-established legal standard remains the same -- that law enforcement officers cannot use excessive or unreasonable force given the totality of the factual circumstances.

Fourth Amendment excessive force claims, under *Graham*, look to the totality of the factual circumstances to determine whether the law enforcement officers use of force was "objectively reasonable." This test is the same test used to determine the "qualified immunity" defense. A finding of unreasonable use of force on the merits would establish that a constitutional claim exists and would defeat the law enforcement officers "qualified immunity" defense. The Fifth Circuit, contrary to the decisions in the other federal circuits, in, this case allowed "qualified immunity" to defeat the Petitioners' claim on the merit that the police officers used unreasonable and unnecessary force.

A panel of peers of the law enforcement officers in the City of Dallas concluded, after an internal investigation was conducted, that the law enforcement officers *did* use unreasonable and unnecessary force against Petitioners Cyr and Capper. The Fifth Circuit denied Petitioners trial on the merits by holding that qualified immunity in a Fourth Amendment excessive force case is a question of law, not fact, and that therefore the "objective reasonableness" can be determined in a summary judgment motion rather than being submitted to a trier of fact.

Indicative of the conflicts which exist in the circuits is the Tenth Circuit's decision in *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994) in which the Tenth Circuit noted the different

analytical postures that may be taken with respect to the qualified immunity defense and the affirmative claims of excessive force. The Tenth Circuit observed:

> If a plaintiff alleges a police officer has used excessive force in violation of the Fourth Amendment, the qualified immunity inquiry becomes indistinguishable on the merits of the underlying action. In contrast, Mr. Guffey does not claim officer Wyatt used excessive force, but that defendant had no probable cause to arrest him. Even if defendant's conduct proves unreasonable under the Fourth Amendment, it "may nevertheless be objectively reasonable for purposes of qualified immunity."

Id. at 873. The district courts are equally confused about the interrelationship between applying qualified immunity in Fourth Amendment excessive force cases. *See, Landy v. Irizery*, 884 F.Supp. 788 (S.D.N.Y. 1995).

The conflict between the federal circuits as to the proper analysis to take is brought into further relief by the Sixth Circuit's decision in *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989). There the plaintiff asserted that the police officer shot the plaintiff without just cause and the police officer defendant asserted that he shot the plaintiff only after the plaintiff pointed a shot gun at him and his fellow officers. In analyzing the immunity question, the Sixth Circuit stated that it was unable to make a determination because the proper characterization of the facts was unknown. Because of the conflict in the facts, or reasonable inferences which could be drawn from the facts, the Sixth Circuit held that: "In this case . . . the jury became final arbiter of appellant Sharp's claims of immunity since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury." *Brandenburg*, supra at 15-16.

Other circuits have held that qualified immunity is not an appropriate defense to a Fourth Amendment excessive force claim. The Tenth Circuit in *Mick v. Brewer*, 76 F. 3d 1127, 1135 n. 5 (10th Cir. 1996) stated that "in excessive force cases the application of the qualified immunity defense is controlled by the same standard as the underlying alleged constitutional violation: whether the officer's actions were objectively reasonable. . . . [T]he district court correctly observed that the qualified immunity test and the excessive force standards separately inquire whether the defendant officers' conduct was objectively reasonable under the circumstances". The Ninth Circuit in *Alexander v. County of Los Angeles*, 64 F. 3d 1315, 1322 (9th Cir. 1995) has also held that the inquiry as to whether the officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim. The Sixth Circuit in *Adams v. Metiva*, 31 F. 3d 375, 387 (6th Cir. 1984) reversed a summary judgment because "there are contested issues of material facts in regard to [the law enforcement officers] actions in arresting plaintiff and the use of force, the jury must decide these issues in regard to qualified immunity." The Sixth Circuit's analysis is directly opposite the analysis of the Fifth Circuit in this case which decided the merits of the Petitioners' claim by summary judgment.

The District of Columbia Circuit has also held that the scope of "qualified immunity" must be evaluated using the same "objective reasonableness" criteria with which *Graham* directs us to scrutinize an officer's actions under the Fourth Amendment. We believe that standard provides the test for evaluating both the scope of the officers' qualified immunity as well as the Petitioners' claim of excessive force under the Fourth Amendment." *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993). A clear conflict exists among the federal circuits and the federal district courts as to how the "qualified immunity" defense is to be analyzed and applied in the context of a Fourth Amendment excessive force claim. Some courts decide both issues as a matter of law as did the Fifth Circuit in this case, while other circuits in other district courts correctly conclude

that the test for qualified immunity is the same test as the plaintiffs' claims on the merits, and, thusly, must be reserved for the trier of fact. The Fifth Circuit's decision that qualified immunity in excessive force cases can always be decided on the basis of a question of law, without reference to the totality of the circumstances, is in direct conflict with other federal circuits and this Court's analysis in *Graham v. Conner*. The confusion among the circuits and the federal district courts is perplexing and extreme.

III. The *Graham* Standard is being Incorrectly and Improperly Applied by the Federal Circuits.

The critical question before this Court is whether the Respondents established, as a matter of law, Respondents' entitlement to the affirmative defense of "qualified immunity." Under Fifth Circuit law, the examination of a claim of qualified immunity is a two-step process. The first inquiry is whether a plaintiff has alleged a violation of a clearly established constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991); *Harper v. Harris County Texas*, 21 F.3d 597, 600 (5th Cir. 1994). It is well established that if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated. *King v. Chide*, 974 F.2d 653, 656 (5th Cir. 1992). Thus, by alleging "excessive force... aris[ing] in the context of an arrest," the Petitioners have adequately alleged the violation of a clearly established constitutional right. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Dunn v. Denk*, 79 F.3d 401 (5th Cir. 1996).

The next inquiry is whether the "officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 387 (1989); *see also, Harper v. Harris County, Texas*, 21 F.3d at 600; *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992). Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a court to balance "the nature and quality of the intrusion on the

individual's Fourth Amendment interests, against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. at 396. Because the "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citations omitted). Thus, under a *Graham* analysis, a court should consider each of the following factors in determining the reasonableness of police conduct in an arrest context: (1) a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against (2) the countervailing governmental interests at stake, (3) severity of the crime at issue, (4) immediacy of threat to the safety of officers or others, (5) whether the individual is actively resisting arrest or attempting to evade arrest by flight, (6) the perspective of a reasonable officer on the scene, and (7) objective appraisal regardless of subjective motive. *Id.* at 396-97. Applying this analysis to the facts in this case and the evidence contained in the summary judgment record before the Court, it is clear that at the very least a genuine issue of material fact exists as to the objective reasonableness of the Respondents' conduct. Accordingly, summary judgment in this case is improper.

A. Nature and Quality of the Intrusion on the Plaintiffs' Fourth Amendment Interests.

Fourth Amendment interests which the courts have recognized in a "seizure" setting include a right not to be subjected to unwarranted emotional indignities, physical pain, and bodily injuries, as well as an expectation interest that if one behaves peaceably, one should not be treated with violence by the police. The Fifth Circuit no longer requires that a plaintiff establish significant physical *injury to maintain* an excessive force claim: pain can suffice. The summary judgment evidence clearly establishes that Petitioners did sustain injuries as a result

of being sprayed in the face with pepper mace. Pepper mace was known by the Respondents to cause a variety of physical and emotional injuries. Petitioners obtained treatment from the County nurse before being incarcerated. Under Fourth Amendment law, nonviolent conduct should entitle an arrestee to a reasonable expectation of receiving nonviolent treatment from the police. The deliberate application of severe pain on a passive arrestee constitutes an unreasonable and serious intrusion on an individual's constitutional rights. As such, the countervailing governmental interest must be great to warrant such a seizure in the case of passive resistance.

B. Governmental Interests.

In the context of a passive arrestee, several governmental interests are at stake. Officers are authorized to use force when their safety is threatened. In enforcing the law and effecting arrests, it is in the interests of the officers that they limit the risk of injury to themselves and that they act with efficiency. In a passive resistance scenario, an officer faces no risk of physical injury. Complaints about having to carry the arrestee do not raise the level of fear for the officers safety, and spraying chemicals into the arrestees' faces has no corresponding relationship to the officer's alleged "safety" concern. To the contrary, persons sprayed with mace are often left completely immobilized. In this case the force used was purposefully painful. Spraying mace into the faces of the handcuffed passive Plaintiffs while they lay on the floor did not ensure that the Plaintiffs would get to their feet. Therefore, the officers were required to follow up with a control hold and actually drag the protestors out of the clinic. As such, the use of force in this case, i.e., mace, did not limit the risk of injury to the officers involved.

The force used, pepper mace, was not used to move the Petitioners out of the clinic. Instead, it was used to punish them for refusing to get up and walk out of the clinic. It worked as punishment does, by hurting the Plaintiffs enough so that they would do something to avoid being maced again. As the Respondents admitted -- they sprayed the Petitioners twice and told them they would be sprayed if they did not walk. Whether

the force is effective bears on its reasonableness. In this case, because the ultimate purpose of the police was to make the Petitioners get up and walk out of the clinic, and because the use of mace inflicted great pain without directly accomplishing this purpose, the use of mace was neither reasonable nor effective under the circumstances. Thus, because the governmental interest was not efficiently served by the pain technique applied, there is no balance. The intentional infliction of pain by the Respondents in this case was not a reasonable means of achieving a legitimate end or state objective.

C. Severity of the Crime

The force used in this case to hurt the Petitioners, spraying pepper mace into the face of the Petitioners after they were handcuffed, was not reasonable for the severity of the crime being committed -- trespass, which is a Class B misdemeanor. Accordingly, less force was necessary and reasonable in this case than in situations involving more serious crimes or safety threats.

D. Immediate Threat to Safety.

The *Graham* criterion, posing an immediate threat to the safety of the officers or others, affords justification for the use of force, but not the force which was used by Respondents. In this case, there is not a scintilla of evidence that either of the Petitioners engaged in or threatened to engage in any violence of any kind against the Respondent officers or anyone else. Instead, the summary judgment evidence clearly establishes that the Petitioners were not actively resisting arrest. They passively resisted arrest. The Petitioners did not threaten, strike or attack in any way the Respondent officers. They simply laid flat on the floor. The Petitioners posed no immediate threat of violence to the officers or anyone else at the clinic. At no time during the demonstration did the Petitioners threaten violence to anyone present at the clinic. Petitioners were unarmed. Thus, because no immediate threat to the safety of the officers or others existed in this case, such factor does not justify the use of mace under the circumstances.

E. Active Resistance or Threat of Flight.

While passive resistance is a form of resistance, it is certainly not the "active resistance" intended by the Court in *Graham v. Connor*. While the use of force is often necessary to bring under control a suspect who actively resists arrest by trying to escape or overpower the officer, no such active resistance existed in this case. In fact, the Petitioners relinquished all physical control to the power of the officer by laying handcuffed on the floor. Additionally, it goes without saying that the Petitioners did not attempt to evade arrest by flight. No evidence exists of evasion or fleeing attempts by Petitioners.

F. On-the-Scene Perspective

Graham requires that the reasonableness determination be made "from the perspective of a reasonable officer on the scene." 490 U.S. at 396-97. The rationale for this factor is to allow for the necessity of split-second decisions made by officers in rapidly changing and often hostile circumstances. However, this is not the scenario of the typical arrest of a passive anti-abortion demonstrator. Typically, police are well aware of the passive techniques employed by these demonstrators prior to arrival on scene, so that police departments have plenty of time to prepare alternative enforcement strategies to deal with passive resistance. No evidence of "split-second" decision making is present here. The Respondents' decisions were very deliberative.

G. Balancing the Factors.

The above analysis makes clear that the use of pepper mace on the Petitioners in this case severely intruded upon the Petitioners' interests in their own bodily security and personal dignity. The countervailing governmental interests of duty to arrest and safety were not facilitated by the use of mace in this case. To the contrary, the use of mace in this case did not assist in the removal of the Petitioners from the clinic; rather, such force was used merely to punish the Petitioners. Finally, given that the crime at issue is a class B misdemeanor, that there was an absence of any threat to the officers' safety by a handcuffed

passive arrestee, and that there were available alternative means of moving the passive resisters, it is clear that the Respondents' conduct in this case was not objectively reasonable. Moreover, in light of the above references to the summary judgment record, it is clear that at the very least a genuine issue of material fact or reasonable inference exists as to the objective reasonableness of the officer's conduct in this case. Accordingly, the Respondents were not entitled to qualified immunity as a matter of law, and the district court's grant of summary judgment should be reversed.

Approximately one year ago the Fifth Circuit rejected a defendant's qualified immunity defense based upon a Motion for summary judgment. The Court set forth the three requirements that a citizen must satisfy in order to overcome a defense of qualified immunity. First, the citizen must "assert a violation of a constitutional right." Second, the citizen must "show that this right was clearly established at the time of" the offensive actions. Third, the citizen must show that the law enforcement officers' actions were "objectively unreasonable." *Eugene v. Alief Independent School District*, 65 F.3d 1299, 1304 (5th Cir. 1995). *Eugene* was, as is the case presently before the Court, a summary judgment case. This Circuit found that the summary judgment evidence "created a fact issue as to whether [the law enforcement officers actions] were objectively reasonable." *Eugene, supra*, at 304. This court concluded that "a reasonable fact finder could have concluded, based on this evidence, that she was simply looking for a bathroom when Griffin. . . assaulted her." *Id.*

This court went on to conclude that because the summary judgment evidence created a fact issue as to whether the law enforcement officers were entitled to qualified immunity, the district court erred in granting summary judgment on that ground. Precisely the same type of procedural posture is presented in this case. Judge Solis granted a summary judgment based upon a summary judgment record that has facts which are undisputed, but from which a reasonable fact finder could conclude that the officers' conduct was objectively unreasonable

in light of the circumstances. Even though the summary judgment facts presented in this case are not substantially in dispute, the reasonable inferences that a fact finder could draw from those facts could differ significantly from the conclusions reached by the district court. It is improper for the district court to make inferences and conclusions of facts, even though the facts are substantially undisputed, when the district court is acting in the capacity of ruling on a motion for summary judgment. Only the fact finder, or jury, has the right to make inferences from the facts -- even when the facts are not in substantial dispute. A reasonable finder of fact could conclude, based upon the admissions of the City of Dallas and its law enforcement officers and the findings of the Internal Affairs Division of the City of Dallas Police Department that officers Parker and Maines used excessive force against Plaintiffs Cyr and Capper and that the City and official capacity, Respondents failed to train and supervise the subordinate officers adequately to the extent that such failure amounted to conscious indifference to Petitioners' Constitutional rights. The district court erred in substituting its fact finding judgment and inferences in place of the jury.

IV. The District Court Erred in Granting Summary Judgment to Defendants on Plaintiffs' Claim of Inadequate Training.

The officers who administered the chemical pepper mace spray to Petitioners admitted in the summary judgment record that they had inadequate training on the use of such chemical device when dealing with passive, non-resisting protestors. (TR. Vol. 3, pp. 517, 518, 522). The City of Dallas official responsible for the training of the City of Dallas law enforcement personnel on the proper use of the chemical pepper mace admitted in the summary judgment records that the law enforcement officers did not have proper or adequate training on the use of pepper mace in situations involving passive, non-resisting protestors. (TR. Vol. 3, p. 523). The district court 's opinion failed to address the claims of the Petitioners of a breach of the duty to adequately train law enforcement officers

on the proper use of the chemical pepper mace weapon when dealing with passive, non-resisting protestors.

The Opinion of the Court acknowledges Petitioners' claim of a "breach of the duty to adequately train" but fails to properly address the claim in the Opinion. *See,* Opinion at 5. The district court erred in its interpretation of the Supreme Court's decision in *City of Canton v. Harris*, 489 U.S. 378 (1989). The district court erroneously believes that the omission to train must amount to an "intentional choice." The Supreme Court did not adopt "intentional choice" as the test for determining whether or not a municipality has breached a constitutional right by failing to adequately train or supervise police officers. Intent on the part of the City of Dallas is not the standard; therefore, the district court's statement that "[t]he Plaintiffs have provided no such evidence to establish that the City of Dallas *intentionally* omitted a training program designed to educate officers on the use of mace against passive resisters of arrest" is inapplicable. (emphasis added).

The Supreme Court ruled in *City of Canton v. Harris*, 489 U.S. 378 (1989) that a municipality may be held liable for constitutional violations caused by its failure to train employees. Inadequacy of training may serve as a basis for Section 1983 liability where the failure to train amounts to "deliberate indifference" to the constitutional rights of persons with whom the police may come into contact. In the view of the Supreme Court, the Court held that liability may be imposed where "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the adequacy so likely to result in violation of constitutional rights, that the policy makers of the City can reasonably be said to have been deliberately indifferent to the need." The Court held that the inadequacy of the training and the indifference can be said, under these circumstances, to have been fairly representative of the policy for which the City is responsible.

Numerous courts have recognized a plaintiff's right to recover for inadequacy of training where municipalities have failed to instruct police regarding appropriate circumstances for

the use of force. See, *Harrell v. Decatur County, Ga.*, 22 F.3d 1570 (11th Cir. 1994) (case remanded for trial on issue of whether sheriff had properly orally instructed deputies re: use of deadly force, although department manual had not been rewritten subsequent to Garner); *Zuchel v. City and County of Denver Colo.*, 997 F.2d 730 (10th Cir. 1993) (not necessary to find that the City condoned unconstitutional shootings, sufficient to prove inadequate training; City was on notice of need for training due to communication from D.A.'s Office that numerous officers had used deadly force); *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991) (failure to train on the legal limits of permissible force); *Parker v. District of Columbia*, 850 F.2d 708 (D.C. Cir. 1988) (failure to train in appropriate police practices to avoid need for using deadly force); *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987); *Wierstak v. Heffernan*, 789 F.2d 968 (1st Cir. 1986); *Rock v. McCoy*, 763 F.2d 394 (10th Cir. 1985); *Voutour v. Vitale*, 761 F.2d 812 (1st Cir. 1985); *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992) (failure to train officer adequately with result that he allowed his baton to be taken from him and then killed an unarmed civilian, purportedly to save his own life).

The undisputed summary judgment evidence -- that there was no training on the use of the chemical pepper mace spray on passive non-resisting suspects -- is more than sufficient to sustain the Petitioners' burden in a motion for summary judgment. Based upon the evidence presented in the summary judgment record, a reasonable jury could conclude that the City of Dallas failed adequately to train the law enforcement officers with respect to the use of the chemical mace spray and that such failure resulted in the officer's misuse and violation of the constitutional rights of the Petitioners. It is not necessary that the Petitioners allege a specific "policy" when evidence exists in the record to establish that the officers involved in the incident and their training supervisor had stipulated and admitted that no training ever existed. Thus, the City and the official capacity Respondents are not entitled to a summary judgment on the Section 1983 claims because of their failure, as admitted in the record, to provide officers Parker and Maines with appropriate

and adequate training on the use of pepper mace spray and the use of this type of pain compliance technique when neither safety nor a fleeing suspect are an issue. The Court erred in granting summary judgment to the City and the official capacity defendants.

CONCLUSION

The district court erred in substituting its judgment for that of a jury and in failing to make all inferences from the facts in Petitioners' favor. Juries can hear the same evidence and reach different results. The Respondents have already admitted that the law enforcement officers used excessive force and that the officers were inadequately trained and supervised. The Respondents' admissions establish the evidentiary basis for inferences that a jury might make at trial. The district court's factual inferences and analysis are seriously flawed and cry out for reversal with instructions.

For these reasons, Petitioners pray that the Court reverse the district court's summary judgment and remand to the district court for trial.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10937

U.S. COURT OF APPEALS
FILED JULY 3, 1997
Charles R. Fulbruge III, Clerk

RECEIVED JULY 7, 1997

THOMAS CYR; KEVIN CAPPER
Plaintiffs – Appellants,

v.

CITY OF DALLAS, TEXAS; DALLAS POLICE DEPT; DALLAS POLICE DEPT; ROBERT JACKSON, Interim Dallas Police; GRANVER TOLLIVER, Deputy Chief, Commander of the Dallas Police Department Special Operations Bureau, Tactical Division; RICHARD GARCIA, Sergeant, individually and in his official capacity as a Dallas Police Officer; HERBERT W PARKER, Senior Corporal, individually and in his official capacity as a Dallas Police Officer; JOSEPH R MAINES, individually and in his official capacity as a Dallas Police Officer; DOUG KOWALSKI, Captain, individually and in his official capacity as a Dallas Police Officer
Defendants – Appellees.

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion _____ 5 Cir., _____, _____ F.3d_____)

Before SMITH, DUHÉ and Barksdale, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration for this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

[CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE]

UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

FILED APRIL 03, 1997
CHARLES R. FULBRUGE III, CLERK

No. 96-10937
Summary Calendar

THOMAS CYR; KEVIN CAPPER
Plaintiffs-Appellants,

versus

CITY OF DALLAS, TEXAS; DALLAS POLICE DEPT.; ROBERT JACKSON, Interim Dallas Police; GRANVER TOLLIVER, Deputy Chief, Commander of the Dallas Police Department Special Operations Bureau, Tactical Division; RICHARD GARCIA, Sergeant, individually and in his official capacity as a Dallas Police Officer; HERBERT W. PARKER, Senior Corporal, individually and in his official capacity as a Dallas Police Officer; JOSEPH R. MAINES, individually and in his official capacity as a Dallas Police Officer; DOUG KOWALSKI, Captain, individually and in his official capacity as a Dallas Police Officer,
Defendants-Apellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:95-CV-744-P)

Before SMITH, DUHÉ, and BARKSDALE, Circuit Judges.
PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Thomas Cyr and Kevin Capper appeal the adverse summary judgment in their 42 U.S.C. § 1983 excessive force action. We AFFIRM.

I.

On 27 February 1993, Cyr and Capper, with appoximately 40 others, were involved in a demonstration at the North Dallas Women's Clinic. The clinic director contacted the Dallas police because the protestors were blocking the doorway to the clinic, were walking around inside the clinic, shouting at patients and staff, and were stealing and destroying surgical equipment and endangering patients. Officers Maines and Parker arrested Cyr and Capper for criminal trespass after they refused to leave the clinic.

After being arrested, both Cyr and Capper dropped to the floor and refused to stand and walk out of the clinic. Officers Parker and Maines handcuffed Cyr and Capper, but both refused to stand and walk. When pain compliance techniques were unsuccessful, the Officers warned Cyr and Capper that peppermace would be used. Cyr and Capper failed to heed those warnings. Officer Parker administered a short burst of mace to Cappers's head; when he still did not comply, the Officers carried him outside. Officer Maines administered a burst of mace that struck Cyr on the top of his head, and a second burst to Cyr's face. When the mace proved ineffective, three Officers carried Cyr outside.

Cyr and Capper filed complaints with the Dallas Police Department (DPD), which initiated an internal investigation. The Internal Affairs division found that Parker and Maines' use of mace on the handcuffed abortion protestors was unnecessary and issued written reprimands. After the incident, the DPD instructed its Officers not to use mace when dealing with passive resisters.

Prior to the incident, DPD had trained its Officers on the use of peppermace, but not concerning passive resistance. Peppermace had been authorized as a technique used after

pain-compliance techniques but before the baton when dealing with resistance to arrest.

Cyr and Capper filed suit against the City, the Chief and Deputy Chief of the DPD, and the arresting Officers, claiming, *inter alia*, that the use of mace constituted excessive force, and that the Officers were not adequately trained and supervised. The district court granted summary judgment on the claims against the City and the officers in their individual capacities because, absent a constitutional violation, the plaintiffs were precluded from establishing that the City had adopted a policy which resulted in the deprivation of their civil rights.

II.

The appellants contend that the district court applied incorrect legal standards; that the individual appellants are not entitled to qualified immunity because their actions were objectively unreasonable; and that the district court erred by granting summary judgment on their failure to train/supervise claims because the appellees admitted that the Officers were not trained on the use of peppermace in a passive resistance situation.

A.

The district court did not apply an incorrect summary judgment standard by drawing inferences from undisputed facts. Contrary to the appellants' assertions, whether the appellees' conduct was objectively unreasonable in light of the clearly established law at the time the conduct occurred is a legal, not factual, issue. *See* ***Harlow v. Fitzgerald***, 475 U.S. 800, 818-19 (1982). And, the contention that the court erroneously relied on the "significant injury" requirement for excessive force claims is without merit, because the district court did not apply that standard.

B.

We apply the well-known two-part analysis in addressing qualified immunity claims: (1) whether the plaintiffs alleged the violation of a clearly established constitutional right; and (2) whether the defendants' conduct was objectively reasonable when examined by reference to clearly established law. *E.G.*, ***Siegert v. Gilley***, 500 U.S. 226, 231 (1991); ***Duckett v. City of Cedar Park, Tex.***, 950 F.2d 272, 279-80 (5th Cir. 1992).

1.

The appellants satisfied the first part of this analysis. A claim that law enforcement officers used excessive force during an arrest is sufficent to allege violation of the Fourth Amendment's prohibition against unreasonable seizures. ***Graham v. Connor,*** 490 U.S. 386, 394 (1989).

2.

We agree with the district court, however, that the Officers' actions were objectively reasonable in light of the facts and circumstances surrounding them. It was not clearly established in February 1993 that the use of mace on handcuffed passive abortion protestors constituted excessive force . As the district court noted, although the appellants were not aggressively resisting arrest, they were intentionally making the arrest procedure extremely difficult by refusing to leave the clinic. The atmosphere at the clinic was one of chaos and disorder; the protestors, who outnumbered the Officers, were dispersed throughout the clinic, frightening patients and staff. Capper had tried to crawl through a receptionist's window into the clinic's business office; when prevented from doing so, he confronted some patients in the waiting room about unborn babies. He tried to grab a female patient's hand, and a shoving match ensued when her male companion tried to stop him. Cyr was in the main hallway of the clinic, blocking the entrance to a surgical room and shouting at a patient in need of medical attention, who had

locked herself inside the room and was screaming for help. Moreover, having been told that some of the protestors had stolen surgical equipment, the Officers reasonably could have feared that Cyr and Capper might have armed themselves with such equipment.

Needless to say, the reprimands given Parker and Maines do not establish that they acted unreasonably. The reprimands were issued after an investigation conducted with the benefit of hindsight. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." ***Graham***, 490 U.S. at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." ***Id.*** at 396-97.

C.

Finally, we affirm the summary judgment on the failure to train and lack of adequate supervision claims essentially for the reasons stated by the district court. ***Cyr v. City of Dallas***, No. 3:95-CV-0774-P (N.D. Tex. July 2, 1996) (unpublished).

III.

For the foregoing reasons, the judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED:JULY 8, 1996
NANCY DOHERTY, CLERK

CIVIL ACTION NO. 3:95-CV-0774-P

ENTERED ON DOCKET
7-9-96, PURSUANT
TO F.R.C.P: RULES 58 AND 79a

THOMAS CYR and KEVIN CAPPER,

Plaintiffs,

v.

THE CITY OF DALLAS; THE DALLAS POLICE DEPARTMENT; INTERIM DALLAS POLICE CHIEF ROBERT JACKSON; DEPUTY CHIEF GRANVER TOLLIVER, Commander of the Dallas Police Department Special Operations Bureau, Tactical Division; SERGEANT RICHARD GARCIA, Individually and in his official capacity as a Dallas Police Officer; SENIOR CORPORAL HERBERT W. PARKER, Individually and in his official capacity as a Dallas Police Officer; OFFICER JOSEPH R. MAINES, individually and in his official capacity as a Dallas Police Officer; and CAPTAIN DOUG KOWALSKI, individually and in his official capacity as a Dallas Police Officer,

Defendants.

MEMORANDUM OPINION AND ORDER

Now before the Court are:

1. Defendants' Amended Motion for Summary Judgment and Brief in Support, Filed October 3, 1995;

2. Plaintiffs' Response and Brief to Defendant's Amended Motion for Summary Judgment, filed October 3, 1995;

3. Plaintiffs' Affidavit in Support of Plaintiffs' Response to Defendants' Amended Motion for Summary Judgment, filed January 18, 1996;

4. Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Summary Judgement, filed October 19, 1995.

BACKGROUND

The factual accounts of the events that transpired at the North Dallas Women's Clinic on February 27, 1993, are essentially undisputed. Officers of the Dallas Police Department ("DPD") responded to an early morning demonstration at the clinic. The Defendants Sergeant Richard Garcia ("Garcia"), Senior Corporal Herbert Parker ("Parker"), and Officer Joseph Maines ("Maines"), at the request of Defendant Captain Doug Kowalski ("Kowalski"), arrived at the clinic to deal with the 40-50 abortion protesters, including Plaintiffs, Kevin Capper ("Capper") and Thomas Cyr ("Cyr"). The protesters were blocking the doorway to the clinic and walking around inside, shouting at patients and staff. The clinic director, Dena Jackson, informed Garcia that the protesters were stealing and breaking surgical equipment, such as syringes and a sonogram machine, and endangering patients. Garcia and Ms. Jackson walked through the clinic warning all of the protesters that they were not permitted inside and would be arrested for criminal trespass if they did not leave. About a dozen protesters opted to leave at that time and exited the clinic. Plaintiffs Cyr and Capper remained inside the clinic with the remainder of the protesters. The Plaintiffs' arrests occurred at different locations within the clinic.

Capper first tried to crawl through a receptionist window into the business office of the clinic. Garcia physically prevented Capper's entry and told him to leave. Capper then turned to some patients who were waiting on a couch and confronted them about unborn babies. He made aggressive gestures toward one of the patients, trying to grab her hand. Her male companion tried to stop Capper and a shoving match ensued. Parker separated the two and, on Garcia's order, informed Capper he was under arrest for criminal trespass. Capper fell limp between two couches and assumed the fetal position, locking his legs around a coffee table. Parker and Officer Jackson handcuffed Capper with great difficulty. Parker repeatedly asked Capper to stand and walk out, but Capper refused to acknowledge him.

Parker then used a "pressure point" tactic (application of force on particularly sensitive areas of the face and neck), in an attempt to gain Capper's compliance. The tactic did not work, so the officers dragged Capper out into the middle of the room. Parker again asked him to stand, but Capper refused. Parker then warned Capper twice that he would use peppermace if he did not stand and walk. Capper remained unresponsive, his body limp with dead weight. The clinic was still full of abortion protesters and the situation was becoming increasingly dangerous for the patients, the staff, and the officers. After a final warning, Parker administered a short burst of mace to Capper's head. Capper still did not comply, and the officers were forced to carry him outside to complete the arrest.

Meanwhile, Cyr was deeper inside the clinic, in the main hallway, shouting at a patient in a surgical room. The patient was yelling for help. Garcia told Maines and Officer Thomas to arrest Cyr for criminal trespass. Cyr dropped to the floor and refused to hold out his hands. The officers carefully handcuffed Cyr, but he refused to stand and walk. After Cyr refused numerous verbal requests, the officers attempted several pain compliance tactics, to no avail. Because Cyr was blocking the entry to a room in which a patient needed

medical attention, the officers warned Cyr that they would use mace if he did not stand and walk. After three of such warnings were issued, Maines administered a short burst of mace that struck Cyr on the top of his head. Maines then delivered a second burst to Cyr's face. When the mace proved ineffective, three officers carried Cyr outside.

Outside, several officers wiped the Plaintiffs faces with towels. The Plaintiffs were instructed to look into the wind to alleviate the pain. Upon arriving at the Lew Sterrett jail facility, a nurse flushed out the Plaintiffs' eyes and washed their faces. The peppermace caused shortness of breath, coughing, severe eye irritation, a running nose, and pain about the entire facial area. The effects lasted about forty-five minutes, until the Plaintiffs' eyes were completely flushed. The peppermace caused no long term or permanent injuries to the Plaintiffs.

Plaintiffs then filed a complaint with the Dallas Police Department which initiated an internal investigation into the incident. After interviewing the officers and several witnesses, the DPD Internal Affairs division issued written reprimands to Parker and Maines for the use of mace on the protesters. Since the incident, the DPD has instructed its officers not to use mace when dealing with passive resistance. Prior to the incident, DPD had trained its officers on the use of peppermace, but not concerning passive resisters. The peppermace had been authorized as a technique used after pain compliance techniques but before the baton when dealing with the resistance of arrest.

Plaintiffs originally filed suit against the Defendants in state court, but later amended the complaint to include a cause of action under 42 U.S.C. § 1983. Defendants then promptly removed the case to federal court. In addition to the federal claim, Plaintiffs allege that the use of mace and pain techniques to gain compliance constitutes state claims of excessive force, unreasonable seizure, interference with right of conscience, assault and battery, civil conspiracy, intentional infliction of emotional distress, and a breach of the duty to

adequately train and dispatch officers on the part of the command structure of the DPD. Defendants have filed for summary judgment, asserting, *inter alia*, the defenses of qualified immunity, sovereign immunity, and absence of a constitutional tort.

STANDARD OF REVIEW

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 447 U.S. 317, 323-25 (1986); *Thomas v. Harris County*, 784 F.2d 648, 651 (5th Cir. 1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party must identify the evidence on file in the case that establishes the absence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323.

Once the moving party has made an initial showing, the party opposing the motion must offer evidence sufficient to establish the existence of essential elements of the party's case. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent a summary judgement; the party defending against a motion for summary judgment cannot defeat the motion unless he or she provides specific facts that show the case presents a genuine issue of material fact such that a jury may return a favorable verdict. *Anderson*, 477 U.S. at 256-7.

All evidence and the inferences to be drawn therefrom "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold*, 369 U.S. 654, 655 (1962); *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1123 (5th Cir. 1979). However, if the non-moving party fails to make a showing sufficient to establish the existence of an

element essential to her case on which she will bear the burden of proof at trial, summary judgment must be granted. *Celotex Corp.*, 477 U.S. at 322-23.

Finally, the Fifth Circuit recently held that the summary judgment standard "provides that the mere existence of some factual dispute will not defeat a motion for summary judgment; Rule 56 requires that the fact dispute be genuine and material." *Willis v. Roche Biomedical Lab.*, 61 F.3d 313, 315 (5th Cir. 1995). This burden is "not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

DISCUSSION

Because the Plaintiffs have asserted a multitude of both state and federal claims, the Defendants have offered varying defenses. The facts underlying each claim are essentially undisputed, leaving the Court to decide the various legal questions, such as the reasonableness of the Defendants' actions, the applicability of various immunities, etc., in determining whether a summary judgment is proper. The discussion will individually focus on the different claims against the different Defendants.

I. Claims Against the Officers in their Individual Capacities

A. Federal claim under 42 U.S.C. § 1983

When sues in an individual capacity, an official who acts within the scope of his discretionary authority and in the course of his official responsibilities is entitled to the defense of qualified immunity, unless it is shown by specific allegations that he violated a clearly established statutory or constitutional law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As a general rule, a public official enjoys a qualified "immunity from suit," not just immunity from liability. *Salas v. Carpenter*, 980 F.2d 299, 301 (5th Cir. 1992) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526

(1985)). Further, a plaintiff bears the burden of negating an official's qualified immunity defense. *Salas*, 980 F.2d at 304. In the Fifth Circuit, the qualified immunity defense involves a shifting burden of proof, and the law is that both parties bear a burden. *Id.* A defendant official must initially plead his good faith and establish that he was acting within the scope of his discretionary authority. The officers in this case have each asserted this defense by stating in their affidavits that they were acting in good faith within the authority of their positions, and that they did not violate Plaintiffs' constitutional rights. Garcia Aff. at 5; Parker Aff. at 4-5; Maines Aff. at 5-6; Kowalski Aff. at 3.

Once the Defendants have pleaded their defense, the qualified immunity determination requires a two-step analysis. In *Siegert v. Gilley*, 500 U.S. 226, 231-2 (1991), the Court clarified the analytical structure under which a claim for qualified immunity should be addressed. First, the plaintiff must rebut the qualified immunity defense by establishing that the defendant violated a clearly established right. Therefore, as an initial matter, a court must determine whether the plaintiff has actually alleged a violation of a clearly established constitutional right. *Id.* The Fifth Circuit does not require that an official demonstrate that he did not violate clearly established federal rights; precedent places that burden upon plaintiffs. *Salas*, 980 F.2d at 306. If the plaintiff crosses this threshold, the second step is for a court to examine the objective reasonableness of the defendant's conduct, because even if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable. *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993).

1. Violation of Constitutional Right

For the Plaintiffs to pierce through an asserted qualified immunity defense, they must first plead a constitutional violation. Plaintiffs allege that the officers, by using excessive force, conducted an unreasonable seizure under the Fourth Amendment of the U.S. Constitution, causing a deprivation of rights under 42 U.S.C. § 1983. To prevail on

an excessive force claim, a plaintiff must prove each of the following elements: (1) an injury, (2) resulting directly and only from the use of force that was clearly excessive to the need; and (3) the excessiveness of which was objectively reasonable. *Hudson v. McMillian*, 503 U.S. 1, 5-6 (1992); *Graham v. Connor*, 490 U.S. 386, 395; *Knight v. Caldwell*, 970 F.2d 1430 (5th Cir. 1992).

Because the facts are undisputed, the only question that remains concerns the reasonableness of the Defendants' conduct. The Plaintiffs allege that the use of the pain compliance techniques and peppermace was unreasonable and excessive and caused their injuries. The Defendants argue that the force was reasonable under the circumstances and that the plaintiffs suffered pain, but no injuries, as a result. Indeed, Plaintiffs have offered no evidence to show any long term effects or injuries, such as medical reports, psychological evaluations, lost time at work, etc. The parties have both stated the only effects on the Plaintiffs were pain and irritation. The Plaintiffs were seen by the nurse at the county jail, but received no medical treatment other than having the mace washed from their faces. Capper Aff. at 4; Cyr Aff. at 4; Peppermace does cause temporary, albeit intense, pain, but leaves no lasting physical injuries. Plaintiffs also claim they mentally suffered from the incident. However, they have submitted no verification of this either. In essence, Plaintiffs have alleged that they suffered both physical and mental injuries, but have provided no evidence to support either claim.

Even had the plaintiffs suffered injuries of some kind, the officers used objectively reasonable force in light of the situation. Police officers are justified in using reasonable force to overcome resistance to arrest. Tex. Penal Code § 9.51. Although the plaintiffs certainly were not aggressively resisting arrest, they were intentionally making the arrest procedure extremely difficulty by refusing to cooperate. The atmosphere of the situation was one of chaos and disorder. The Defendants felt it necessary to quickly arrest and remove

those abortion protesters who remained in the clinic after having repeatedly been instructed to leave. The officers first used pressure point tactics to no avail, and then chose mace as the next method of gaining compliance. The use of mace was predicated with several warnings. The police officer did not use the mace arbitrarily, but rather as a last resort to move the protesters once the other compliance methods failed.

In a strikingly similar case, the Ninth Circuit affirmed a jury finding that police officers acted reasonably in using "nonchukas," pain compliance devices that cause extreme pain, and other physical tactics when arresting abortion protesters within a clinic. *Forrester v. City of San Diego*, 25 F.3d 804, 805 (9th Cir. 1994). The facts in *Forrester* are remarkably similar to the present case. Anti-abortion demonstrators entered into a clinic and refused to cooperate when the police tried to place them under arrest. *Id.* After unsuccessfully using pressure point compliance tactics, the officers wrapped nonchukas (two sticks of wood connected at one end by a cord) tightly around the protesters' wrist to force them to stand and walk, causing severe pain, bruises, a pinched nerve, and even a broken wrist. *Id.* At 806. The court in *Forrester* distinguished between the administering of increasing degrees of pain to gain compliance and the malicious delivery of threats, blows, kicks, cuts, or lethal force. *Id.* At 807. In our case, the peppermace served to increase the level of pain administered without resorting to more dangerous and violent conduct. One could hardly argue that peppermace is more egregious than the use of nonchuckas which cause excruciating pain and lasting injuries.

Plaintiffs argue that the subsequent reprimands of Parker and Maines are evidence that the Defendants acted unreasonably. However, the DPD may require a higher standard of conduct from its officials than that required by the United States Constitution. The reprimands state simply that Internal Affairs found the use of mace *unnecessary* given the hindsight of a thorough investigation. However, the U.S.

Constitution does not require police officer to use the absolute least intrusive degree of force. Instead, it only requires the force be reasonable to effect that particular arrest. *Graham* 490 U.S. at 396. That the DPD demands a higher standard of conduct from its officers than does the Constitution is admirable. Allowing a plaintiff to use the internal discipline administered by the DPD against them in a lawsuit would discourage such high standards of conduct. Thus, the fact that the officers were internally reprimanded certainly does not by itself create a conclusive presumption that they committed the constitutional tort of excessive force.

Given the situation as it existed at that time, it can not be said that the Defendants violated the Fourth Amendment rights of the Plaintiffs. Thus, because the plaintiffs have failed to allege a constitutional violation, they do not pass the first test in overcoming the Defendants' qualified immunity. However, even had the Plaintiffs been able to allege an actual constitutional violation, the objective reasonability of the Defendants' conduct would still have to be assessed before Plaintiff could ultimately pierce the qualified immunity defense.

2 Reasonableness of Officers' Conduct

As stated above, the second prong of the determination of qualified immunity involves whether or not the conduct of the defendant, even if it violates a constitutional right, was objectively reasonable under the circumstances. *Siegert*, 500 U.S. at 232. If the conduct of the official was such that no reasonable officer under the circumstances would have believed it to be violation of rights, then the defendant is entitled to qualified immunity. *Id.* Thus, even if this Court found the amount of force used in the arrest to be excessive, it would then examine the totality of the circumstances to determine whether the officers' conduct itself was reasonable.

As stated in the facts, the anti-abortion demonstration at the North Dallas Women's Clinic had become unruly. Protesters had invaded several surgical rooms, reportedly stealing equipment and shouting at patients. The officers at

the scene felt the best course of action would be to clear the clinic of protesters. In doing so, many of the protesters became confrontational, both with officers and patients. Concerned about safety, the officer clearly warned the protester of the consequences of not leaving. Some left at that time, but many remained in the clinic to continue the aggressive demonstration. The officers began to make arrests of protesters that caused too much trouble or were uncooperative. Knowing that syringes were missing, the officer did not want to grapple with the protesters and warned them several times to get up and leave on their own. Only after several warnings did the officers begin to use pain compliance measures or the mace on the protesters.

Plaintiff Cyr blocked the entry to a room in which a patient needed medical attention, and tried to prevent the officers from arresting him by hiding his hands and falling to the floor. Plaintiff Cyr harassed a female patient and her companion in the lobby and resisted arrest by clinging to a coffee table. Because of the patients in need of help, the chaotic atmosphere, and the large number of protesters, the removal of the Plaintiffs had become imperative. When the Plaintiffs refused to cooperate, the officers did what they felt was necessary to complete the arrest of the Plaintiffs. They made repeated verbal warnings, giving the Plaintiffs every opportunity to comply. When the Plaintiffs refused, the officers used pressure point tactics and mace to finally gain compliance.

At the time, the Dallas Police Department had no clear policy prohibiting the use of mace to overcome passive resistance to arrest. Mace was simply an additional method to gain compliance after pressure point tactics prove unsuccessful. Thus, a reasonable officer, given the urgency of the situation and the uncooperative nature of the Plaintiffs, could not have believed he was violating the Plaintiffs' rights by using mace. Therefore, the officers are entitled to the defense of the qualified immunity, barring a right of action for violations of 42 U.S.C. § 1983.

A. State Tort Claims

The Defendants also retain qualified immunity to the extent the Plaintiffs have sued the officers in their individual capacities on state tort law ground. The state of Texas extends qualified immunity to government official performing discretionary duties in good faith within the scope of their authority. *Carpenter v. Barner*, 797 S. W. 2d 99, 101 (Tex. App. –Waco 1990, writ denied); *Dent v. City of Dallas*, 729 S.W. 2d 114, 117 (Tex.App.-Dallas 1986, writ ref'd n.r.e.). The Texas Supreme Court has described the "good faith" standard in similar terms to that of the federal standard discussed above. *City of Lancaster v. Chambers*, 833 S.W.2d 650, 656 (Tex. 1994). A defendant would be entitled to qualified immunity if a reasonably prudent officer, acting under the same circumstances, could believe his conduct was justified. *Id.* Thus, for the same reasoning and analysis described above, the Defendants are also entitled to qualified immunity from the state tort law claims. Therefore, to the extent that the Plaintiffs have sued the officials in their individual capacities, the Defendants are immune from both the federal and state causes of action and should be granted a summary judgment on those claims.

II. Claims Against City of Dallas and Officers in their Official Capacities

The Plaintiffs have also brought the same claims against the City of Dallas ("the City"), the DPD, Interim Dallas Police Chief Robert Jackson ("Jackson"), Deputy Chief Granver Tolliver ("Tolliver"), and the aforementioned officers in their official capacities. Plaintiffs did not sue Jackson or Tolliver in their individual capacities, as they were not affirmatively involved in the incident at the clinic.

In Plaintiffs' Response to Defendants' Motion for Summary Judgement, the Plaintiffs recognize that the City is the appropriate entity to sue for claims against the DPD. Because they had already named the City as a defendant, they simply do not intend to pursue a claim against the DPD. Plaintiffs also

concede that the City is not liable for punitive damages and accordingly withdraw that claim as well.

A. Federal Claims under 42 U.S.C. § 1983

With respect to actions against a defendant in his official capacity, courts have held that such a suit is to be treated as a suit against the entity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Lopez v. Houston Ind. School Dist.*, 817 F.2d 351 (5th Cir. 1987). The *Graham* Court observed that in an official-capacity suit the real party in interest is the entity, and that this type of suit generally represents only another way of pleading an action against the entity of which the officer is an agent. *Graham*, 473 U.S. at 166. Thus, the court will treat the official capacity Defendants and the City as if they were the same.

Accordingly, the Supreme Court has held that any claim against an entity for violation of § 1983 must allege the wrongful act stemmed from an official policy or custom of the entity. *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701, 735-36 (1989). An official policy is " a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by [the] policy-making authority." *Colle v. Brazos Cty, Tex.*, 981 F.2d 237, 245(5th Cir. 1993).

Our finding that no Constitutional tort was committed by the officers precludes the Plaintiffs from claiming that the City had adopted a policy which resulted in the deprivation of their civil rights. Plaintiffs suffered no civil rights violations when they were sprayed with mace for resisting arrest. It follows, then, that no policy of the City resulted in a wrongful act that deprived the Plaintiffs of any Constitutional rights.

The Plaintiffs argue that the defendants breached a duty to adequately train their officers by *failing to adopt policies* that instructed officers on the proper use of mace. While the City's failure to adopt a precaution can be the basis for § 1983 liability, such an omission must amount to an intentional choice, not merely a negligent oversight. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989). The Supreme Court has also held that a municipality's failure to adopt a policy does not constitute such

a intentional choice unless it can be said to have been "deliberately indifferent." *Harris*, 489 U.S. at 390. The Plaintiffs have provided no such evidence to establish that the City Dallas intentionally omitted a training program designed to educate officers on the use of mace against passive resisters of arrest. Thus, even had the Plaintiffs' rights been violated, they have alleged no City of Dallas policy that caused that deprivation. As a result, the City and the official capacity Defendants are entitled to summary judgement for the federal claims under 42 U. S.C. § 1983.

B. State Tort Claims

The Plaintiffs have also brought numerous state claims against the City and the official capacity defendants. In Texas, municipalities retain governmental immunity unless waived by statute or constitution. *State v. Terrell,* 588 S.W.2d 784, 785 (1979). Legislation has abrogated that immunity to some extent in the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 1986). That act waives immunity for tort claims against "governmental units," including cities. However, the act specifically excludes intentional torts, such as those pled by the Plaintiffs. Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (Vernon, 1986); *City of San Antonio v. Dunn*, 796 S.W.2d 258, 261 (1990). The act also specifically excludes claims against municipalities arising from the methods of providing police protection. Tex. Civ. Prac. & Rem. Code Ann. § 101.055 (Vernon, 1986). The Plaintiffs' claims of assault and battery, civil conspiracy, and intentional infliction of emotional distress are intentional torts arising from the methods of police protection used by the officers in their official capacity. Therefore, the City retains immunity against all of these claims.

The Plaintiffs also allege violations of their state constitutional rights. They claim that the conduct of the Defendants constituted an unreasonable seizure under Article I, Section 9 of the Texas Constitution. However, this Court has already found that the use of mace was reasonable given the particular circumstances. The Plaintiffs also allege

deprivation of their "right of conscience, " guaranteed by Art. I, § 6 of the Texas Constitution. However, this provision only provides that the state is not to interfere with private modes of worship; it does not include actions which violate social order or civil law. Interpretive Commentary for Art. I, § 6, p. 297 (Vernon, 1984). The "right of conscience" provision does not excuse the intentional violation of the penal laws of the state of Texas. *Id.* The Plaintiffs were criminally trespassing and repeatedly told to leave the premises. When they refused, they were arrested. At no time did the officers interfere with any mode of the Plaintiffs' religious exercise. Thus, Plaintiffs have neither alleged, nor provided any evidence to support, state constitutional claims against the Defendants. The Plaintiffs state law claims against the City of Dallas and the officers in their official capacities therefore fail, and the Defendants are entitled to summary judgment on these claims as well.

CONCLUSION

The Court finds that the Plaintiffs have failed to establish a genuine factual issue as to whether the Defendants, in their individual capacities, official capacities, or through a policy or custom of the City of Dallas, violated any state or federal constitutional rights or engaged in tortious conduct. Thus, for the aforementioned reasons, the Court finds that the Defendant's Amended Motion for Summary Judgment should be, and is, hereby **GRANTED**.

SO ORDERED this 2nd day of July 1996.

/s/ JORGE A. SOLIS

JORGE A. SOLIS
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED: JULY 18, 1996
NANCY DOHERTY, CLERK

NO. 3:95-CV-0774-P

ENTERED ON DOCKET 7-19-96 PURSUANT TO
F.R.C.P.: RULES 58 AND 79a

THOMAS CYR AND KEVIN CAPPER
Plaintiffs,

vs.

THE CITY OF DALLAS, ET AL.,
Defendants.

FINAL JUDGMENT

Pursuant to the Court's Memorandum Opinion and Order filed in this action on July 8, 1996, the Court has determined that,

It is ORDERED, ADJUDGED and DECREED that:

1. Plaintiffs THOMAS CYR and KEVIN CAPPER, take nothing of their claims against the defendants THE CITY OF DALLAS, THE DALLAS POLICE DEPARTMENT, INTERIM DALLAS POLICE CHIEF ROBERT JACKSON, DEPUTY CHIEF GRANVER TOLLIVER, Commander of the Dallas Police Department Special Operations Bureau, Tactical Division, SERGEANT RICHARD GARCIA, Individually and in his official capacity as a Dallas Police Officer, SENIOR CORPORAL HERBERT W. PARKER, Individually and in his official capacity as a Dallas Police

Officer, OFFICER JOSEPH R. MAINES, individually and in his official capacity as a Dallas Police Officer, and CAPTAIN DOUG KOWALSKI, individually and in his official capacity as a Dallas Police Officer.

2. Accordingly, all costs incurred by the defendants, shall be assessed against the plaintiffs.

IT IS SO ORDERED.

Signed this 18th, day of July, 1996 at Dallas, Texas.

/s/ JORGE A. SOLIS

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

Certified a true copy of an instrument on file in my office on 8-21-96
NANCY DOHERTY, Clerk, U.S. District Court, Northern District of Texas by _____ Deputy